JD(SF)-10-05
Seattle, Washington

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SAN FRANCISCO BRANCH OFFICE
DIVISION OF JUDGES

PHOENIX PROCESSOR LIMITED PARTNERSHIP

And **Case 19-CA-28831**

BRADLEY H. BAGSHAW, an Individual

Joann Howlett, Atty., Counsel for the General Counsel,
Seattle, Washington.
Bradley H. Bagshaw, Atty., Charging Party,
Seattle, Washington.
David Bratz and Gail M. Luhn, Attys.,
Le Gros, Buchanan, & Paul,
Counsel for Respondent, Seattle, Washington.

DECISION

I. Statement of the Case

Lana H. Parke, Administrative Law Judge. This matter was tried in Wenatchee, Washington on October 26 through 29, 2004[1] and in Seattle, Washington on November 8 and 9, 2004 upon Complaint and Notice of Hearing (the Complaint) issued June 24, 2004 by the Regional Director of Region 19 of the National Labor Relations Board (the Board) based upon charges filed by Bradley H. Bagshaw, attorney (Charging Party), and upon amendment to the

[1] All dates herein are 2003 unless otherwise specified.

Complaint issued October 7, 2004.[2] The Complaint, as amended, alleges Phoenix Processor Limited Partnership (Respondent) violated Section 8(a)(1) of the National Labor Relations Act (the Act). Respondent essentially denied all allegations of unlawful conduct.

II. Issues

1. Does the Board have subject matter and personal jurisdiction over Respondent?
2. Does Federal Maritime Law preempt Board consideration of the Complaint issues?
3. Did Respondent violate Section 8(a)(1) of the Act by interrogating employees about their concerted protected activities?
4. Did Respondent terminate employees because they engaged in concerted protected activities and to discourage other employees from doing likewise?

III. Jurisdiction

Respondent, a State of Washington corporation, with an office and place of business in Seattle, Washington, has, at all relevant times, been engaged in the business of seafood processing. During the 12-month period prior to the hearing, a representative period, Respondent annually sold and shipped goods or provided services valued in excess of $50,000 to customers inside the State of Washington, which customers were themselves engaged in interstate commerce by other than indirect means. Respondent admits, and I find, it has at all relevant times been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

On the entire record,[3] including my observation of the demeanor of the witnesses, and after considering the briefs filed by Counsel for the General Counsel, the Charging Party, and Respondent, I make the following

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[2] At the hearing, Counsel for the General Counsel amended the Complaint to allege the following individuals employed by Respondent in the following positions as supervisors of Respondent within the meaning of Section 2(11) of the Act, and/or agents acting on behalf of Respondent under Section 2(13) of the Act:

Juan Aldana	foreman
Jose Rojas	assistant foreman
Jeff Singer	assistant foreman
Esteban Berrera	assistant foreman

Respondent admitted Juan Aldana, Jose Rojas, and Esteban Berrera were supervisors within the meaning of the Act but denied agency status and denied Jeff Singer was either a supervisor or an agent of Respondent.

The parties also stipulated that at all material times, Premier Pacific Seafoods, Inc. (Premier) and Corine Seitz, human resource director for Premier have served as Respondent's agents within the meaning of Section 2(13) of the Act.

[3] Unless otherwise explained, findings of fact herein are based on party admissions, stipulations, and uncontroverted testimony. General Counsel's unopposed post hearing motion to correct the transcript is granted. The motion and corrections are received as Administrative Law Judge exhibit 1.

IV. Findings of Fact

A. Commencement of Respondent's 2003 "A" Season

Respondent operates the S/S Ocean Phoenix (the Phoenix), a 680-foot steam-driven vessel operating primarily in the Bering Sea. The Phoenix serves as a floating fish-processing factory, the base for a small fleet of trawlers, which delivers its catch (primarily Pollock) to the Phoenix. After delivery to the ship, fish undergo an "aging" process in water tanks for a period of five to nine hours depending on factors such as fish size. After the fish are aged, depending on the time of year, factory employees extract Pollack eggs (roe), process the Pollack into Surimi, a fish paste or cake with preservatives, and store the product for later delivery to other processing plants that may subsequently turn it into such fish products as imitation crab. During processing aboard the Phoenix, the fish are moved from one processing stage to another by conveyors, and the end product is ultimately boxed and stacked in walk-in freezers. The process from initial stage to freezer takes about two hours.

The Phoenix makes two processing voyages, or "seasons" a year. "A" season, in which roe are harvested, begins in mid-late January and lasts about 60-90 days or until the company fills its harvest quota. "B" season begins in late summer and lasts until mid-late fall, or until that season's quota is filled.[4] Prior to the 2003 "A" season, processing employees during the "A" season worked, as necessary, seven days a week in 16-hour shifts with a one-half hour lunch break, mid-shift, and two 15-minute breaks, pre and post prandial. During the "B" season, in which the work is less labor intensive than in the "A" season, processing employees work 12-hour shifts.

Respondent compensates its hourly processing employees through a formula based on production or by a guaranteed base rate. The formula provides for payment of a unit rate for each metric ton of frozen product. The unit rate is set at the beginning of each voyage. The employee share, expressed in percentage points, varies depending on the type of product and increases with employment longevity. If, at the end of a voyage, compensation based on production (the production wage) is greater than the base wage, Respondent pays the production wage.

Prior to the 2003 "A" season, Respondent decided to increase the "A" season factory shifts by one-half hour, making each shift 16 ½ hours in duration. Respondent notified former processing employees by letter of its projected start date for the 2003 "A" season but said nothing of the prospective shift duration increase.[5] Individuals desiring employment went to Respondent's Seattle office where they signed an employment contract before boarding the Phoenix. *Inter alia,* the contract for the relevant period provided:

> 1. DUTIES. Employee shall perform his/her duties as requested by the owner, whether written or oral, in connection with the ship's operating and processing activities…at the direction of the employer, Master, Manager, Supervisor or

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[4]The industry also has a Haike season that takes place in the springtime. The Phoenix, however, has not participated in that season for a few years.

[5] Respondent maintains the increased shift is consistent with the employee handbook, which states, "A standard work day consists of 12 to 16 hours within a 24-hour period," contending that the one-half hour lunch break is not part of the shift time. It is clear, however, the overall shift time increased by one-half hour.

2. other person designated by the owner or Master…Failure to perform any of the duties as assigned may result in disciplinary action up to and including termination.

3. CERTIFICATION OF PHYSICAL CONDITION. Employee understands that working conditions aboard the ship are difficult, strenuous and sometimes hazardous and that working hours are often long. Employee has considered these factors before making a decision to accept this employment. Employee represents and warrants to the best of his/her knowledge, that he/she is physically and mentally prepared and able to perform all assigned work for the term of this agreement and that all statements contained in the medical forms furnished are true and accurate in all respects.

….

15. GOVERNING LAW/FORUM. The parties agree that this contract shall be interpreted and enforced in accordance with maritime law of the United States of America, and that the venue for any lawsuit arising from or related to Employee's employment by owner, including but not limited to claims for wages, violation of state and/or federal laws, including laws against discrimination and/or harassment, and also including claims arising under the Jones Act or maritime law, for transportation, maintenance and cure, damages or otherwise, arising out of or in any way connected with any event, happening, injury, disability and/or illness occurring to and/or sustained by employee while employed aboard the vessel shall be only in U.S. District Court, Western District of Washington at Seattle, or the King County Superior Court, State of Washington at Seattle…

The 2003 "A" season work commenced while the Phoenix was docked in Seattle, where processing employees worked 12-hour shifts for several days loading and preparing the vessel for the season. At all relevant times, the following individuals in the following respective positions, served aboard the Phoenix as supervisors within the meaning of Section 2(11) of the Act and/or agents of Respondent within the meaning of Section 2(13) of the Act: [6]

Marc Smith (Capt. Smith)	--	Ship's Captain
Pat Hermens (Mr. Hermens)	--	Factory Manager
Evan Rafferty (Mr. Rafferty)	--	Assistant Factory Manager
Oscar Octaviano (Mr. Octaviano)	--	Foreman
Jose Estrada (Mr. Estrada)	--	Foreman
Juan Aldana (Mr. Aldana)	--	Foreman
Jose Rojas (Mr. Rojas)	--	Assistant Foreman[7]
Esteban Berrera (Mr. Berrera)	--	Assistant Foreman

At all times relevant, the foremen and assistant foremen had 12-hour shift responsibility for processing employees. Accordingly, processing employees answered to two supervisors during their 16 ½-hour shifts.

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[6] Respondent denied Jeff Singer, assistant foreman, was a supervisor and/or agent within the meaning of the Act. General Counsel bears the burden of proving supervisory/agency status. *NLRB v. Kentucky River Community Care*, 121 S. Ct. 1861, 1867-1868 (2001), which he has not met as to Jeff Singer.

[7] Mr. Rojas, who testified under subpoena by General Counsel, voluntarily terminated his employment following "A" season, 2003.

B. Respondent's Change of Working Conditions and Employee Response

A day or two after the Phoenix left Seattle for Alaska, Mr. Hermens met with the factory crew and informed them they would be working shifts lengthened by one-half hour.[8] At that time, no processing employee protested the change or availed himself of the following problem-review procedure set forth in the employee information booklet with which all employees were provided:

> Discuss your problem or concerns with your immediate supervisor, foreperson or manager. If you feel your supervisor is not responsive, you have the right to appeal to higher levels of supervision, ultimately to the Captain.
>
> If your problem cannot be resolved on board the vessel, you may contact the Premier Pacific office in Seattle, which will serve as final authority.

After some days of working the additional one-half hour, the processing employees discussed their dissatisfaction with the longer shifts among themselves; several spoke to Mr. Rojas, day-shift assistant foreman, of their concerns that the lengthened shifts caused increased fatigue and consequent safety hazards. Several employees also protested to Mr. Rojas that the changed schedule prevented their being occasionally assigned to work four hours per shift on the "gut line," a less arduous duty post. Mr. Rojas spoke to Mr. Hermens and Mr. Octaviano about employees' concerns. Mr. Octaviano told Mr. Rojas to leave matters as they were, which Mr. Rojas reported to employees.

Following Mr. Rojas' response, in late January, processing employees circulated and obtained at least 66 employee signatures on the following petition (the petition) addressed to Mr. Hermens:

> Pat,
> We have been most upset with the 16.5-hour shift. During the signing of our contracts we were informed that our shift would be 16 hours long. That leaves us with 8 hours to sleep, eat, take a shower, brush teeth, shave, et cetera. Taking away 30 minutes or 1/16 of our time off has had a drastic effect on our ability to perform our duties at work and afterwards. If you were to restore our 30 minutes, I think you would find that your crew would be more refreshed to work harder and finish the season successfully. We are all more than willing to pull together to see that no one has to work more than 16 hours in a day.

Mr. Rojas observed employees signing the petition; he told Mr. Octaviano of the petition and that employees seemed unhappy—probably about the added one-half hour. He recommended that management talk to employees. Mr. Octaviano told Mr. Rojas not to worry about it. Several days prior to February 2, in a staff meeting, the ship's medic told Capt. Smith that a petition was circulating among the processing employees presumably having to do with the extended shifts. Capt. Smith told the medic that the ship was not a democracy and did not do business by petition. Employees Luis Verduzco, Jr. and Noel Cornelio reported to

[8] It was only after the Phoenix left Seattle that Capt. Smith learned the processing shifts would be lengthened by one-half hour.

employees that they had given the petition to the ship's Purser, who said she would give it to Mr. Hermens.[9] Although both Capt. Smith and Mr. Hermens heard rumors of an employee petition, neither saw it nor spoke to the processing employees regarding it.

C. February 2 Termination of Processing Employees

On February 2, decreased fish delivery to the Phoenix caused a lull in processing. As usual, during the processing downtime, Mr. Rojas directed the day shift processing employees to perform a thorough machine and factory cleanup. At about 4 p.m., Respondent estimated that processing would commence at 7 p.m., and Mr. Rojas planned completion of cleaning to accommodate a 7 p.m. processing start time. Thereafter seriate postponements to 8 p.m. and to 9 p.m. were announced.[10] During the waiting period, employees discussed the fact that Respondent had not responded to the petition and composed another document entitled, "The Voice of the People" (the Voice of the People letter), which read:

> We have heard that you (management can't come with a conclusion about the 16 hrs. So we have come with the conclusion to work 17 hrs. if all [foremen], assistant foreman, surimi techs and the rest of the 12 hrs. shift personnel works 17's also. But not working in the office, they should work in the factory like the rest of the processors. In the Toyo's, case up, freezer, plates, etc. We feel that is not fair for us [t]he people [who] are working being on our 16 hrs. for office management to just be sitting around, when we can't have enough time to rest, and be ready for the next day. You expect us to work harder and get the job done faster, well with more people "experienced" people like, assistants, foreman, etc. we can do the job better, go home faster, and not feel left out to do everything by ourselves. Do not blame the people for what is happening. Blame the management 16 ½.
>
> We need an answer as soon as possible either by today or first thing in the morning.
>
> Sin. The people.

Shortly before 7:30 p.m.,[11] Luis Verduzco, Sr. gave the Voice of the People letter to Mr. Octaviano and asked him to give it to Mr. Hermens. Mr. Octaviano left the area, and a few minutes later summoned Luis Verduzco, Sr. to the office. When he arrived, Luis Verduzco, Sr. found Mr. Hermens, Mr. Aldano, Mr. Rafferty, and Mr. Singer present. Mr. Hermens had the Voice of the People letter in his hand and, with Mr. Octaviano interpreting, asked, "What is the meaning of this?"

Luis Verduzco, Sr. said it was a letter from the people. Mr. Hermens asked who had written the letter. When Luis Verduzco, Sr. repeated that "the people" had, Mr. Hermens asked if Luis Verduzco, Sr. was sure his son had not written it, which Luis Verduzco, Sr. denied. Luis Verduzco, Sr. declined to tell Mr. Hermens who had authored the letter "because[he] knew

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[9] Neither Luis Verduzco, Jr. nor Noel Cornelio testified. Hearsay testimony regarding delivery of the petition to the purser was not received for the truth of that matter but only for establishing employees' beliefs regarding petition delivery.

[10] The first delivery of fish on February 2 arrived about 3 p.m. According to Mr. Hermens, "cutting four-hour fish is a little young," and the processing time was accordingly delayed.

[11] I have based the timing of this meeting on Mr. Hermens' testimony that immediately after meeting with Luis Verduzco, Sr. regarding the letter, he held a regularly scheduled 7:30 p.m. management meeting.

[Mr. Hermens was looking for someone to be guilty…" Mr. Hermens denied he had asked who wrote the letter, saying he had only inquired as to whom he should talk about it, although he admitted that Luis Verduzco, Sr. "did not want to tell [him]… who had written [the letter]." I credit the account of Luis Verduzco, Sr., whose testimony Mr. Octaviano essentially corroborated. Additionally, Mr. Rafferty testified that Mr. Hermens was enraged by the letter and sought to ascertain its author because he wanted accountability. Mr. Hermens directed Mr. Rafferty to find out who the "ringleaders" were, which further supports Luis Verduzco, Sr.'s testimony that Mr. Hermens attempted to glean the same information from him.

According to Luis Verduzco, Sr., Mr. Hermens said he would make time to speak to the employees. Mr. Hermens testified that he only expressed a willingness to talk about the employees' issues when the factory did not have fish to process. After consideration of the surrounding circumstances as well as the witnesses' demeanor, I find that Mr. Hermens did not agree to meet with the protesting employees at that time but only at some indefinite, future occasion. I also find that Luis Verduzco, Sr. believed in good faith that Mr. Hermens intended to meet with the employees that evening.

Luis Verduzco, Sr. returned to the employees and told them that Mr. Hermens had agreed to speak to them. The employees asked Mr. Estrada, who had replaced Mr. Rojas as supervisor at about 7:50 p.m.,[12] to see if Mr. Hermens had time to speak to them at that time. According to Luis Verduzco, Sr., Mr. Estrada returned with a message to the employees that management was waiting for them in the office. Mr. Estrada testified that he only reported to the workers that Mr. Rafferty was going to speak to Mr. Hermens and said nothing about any meeting. Nonetheless, the workers said they were all in agreement and would go together, whereupon they left the work area. I find it unnecessary to resolve what Mr. Estrada told employees regarding a meeting with Mr. Hermens. While it is clear Mr. Hermens did not intend to meet with employees at that time, it is equally clear employees sincerely believed they had been directed to meet with the manager immediately. In short, a misunderstanding occurred, even though its source remains obscure. Approximately 25-30 employees (protesting employees) left the factory work areas and proceeded to the office.

Mr. Estrada then called Mr. Rafferty and told him some of the workers wanted to speak to Mr. Hermens. Mr. Rafferty asked if it looked like a strike, and Mr. Estrada said he did not know. Mr. Rafferty said to get the factory ready to go at 9:00 p.m., and he would speak to Mr. Hermens. Mr. Rafferty told Mr. Hermens a number of workers had walked out of the factory and were demanding a meeting with him. Mr. Hermens directed Mr. Rafferty to take the necessary steps to start the factory with uninvolved factory workers and substitute workers, such as engineers, mechanics, and employees who would normally perform the tail end of processing. As Mr. Rafferty set about manning the factory, he encountered about 25 of the protesting employees congregated in a passageway. According to employees Luis Verduzco, Sr., Asuncion Aguirre, and Gabriel Garibay, Mr. Rafferty told them to remove their work clothes[13] and go to the library; he said all of them were fired and that he did not lose anything, rather they were the losers. Mr. Rafferty denied telling employees they were fired. According to Mr. Rafferty, he only told the group to return to work and directed those who refused to do so to go to the library and not leave it except for restroom use, on pain of termination. The employee witnesses who testified as to what Mr. Rafferty said were consistent and unequivocal in their accounts, and I accept their testimony. While the protesting employees made their way to the

[12] Mr. Rojas retired to his accommodations and did not learn of ensuing events until the following morning.

[13] Work gear consisted of rubberized boots, bibs, and jackets and was called "raingear."

library, Mr. Aldano passed by, carrying a box of new work goggles for distribution to those employees who would replace the protesting machine operators. Alfonso Lopez jokingly said, "Hey, I'll trade you these [goggles]." Mr. Aldano refused, saying the new goggles were for the new machine operators. As directed, the employees went to the library, assuming they had been fired.

While the employees were assembling in the library, Mr. Hermens asked Capt. Smith to meet with him in his office, saying he believed workers had walked off the job. When Mr. Hermens and Capt. Smith met, they agreed that Capt. Smith would talk to the employees in the library while Mr. Hermens and Mr. Rafferty reassigned employees and made arrangements to start production. Witnesses were not fully consistent as to the sequence of managerial/employee meetings that took place thereafter or as to what was said in which meeting. The following description of events is an amalgam of the most consistent and reliable testimony.

Capt. Smith spoke to employees in the library and encouraged them to return to work. He told them their conduct was inconsistent with the problem review procedure set forth in the employee handbook and was not the way to raise employee concerns. Capt. Smith reminded Juan Lovos that when a work stoppage among employees had occurred two years earlier, Respondent had told them the complaint procedures to follow.[14] Capt. Smith said he would talk with them about their concerns later when the factory was out of fish. When employees did not return to work, Capt. Smith considered they had quit and told them so. He directed them to sign their names on an attendance paper, and the following employees signed:

Ramon Mendez	Ruben Ruiz
Jose Cervantes	Miguel Martinez
Winston Brown	Luis Verduzco
Jorge Camacho	Luis J. Verduzco Sr.
Fermin Taisacan	Gabriel Garibay
Maurisio Ramirez	Ricardo Cuevas
Baltazar Gonzalez	Cesar Nieto
Sergio Velasquez	Juan Lovos
Alfonso Flores Lopez	Noel A. Carnelio
Jose Cabrera	Arturo Leon
Jose Luis Corona[15]	Jose Luis Delgadillo

[14] During "A" season of 2001, factory employees engaged in a work stoppage to protest insufficient work breaks. The dispute was resolved after intervention of the captain; the employees returned to work with a two-day pay penalty and an adjusted break schedule. Employees were admonished by the captain, in writing, of the proper chain of command with which to address concerns: "direct supervisor, assistant foreman, foreman, assistant factory manager, factory manager and finally Captain. [If necessary] contact the personnel office in Seattle."

[15] At some point during the evening of February 2, Ramon Mendez, Fermin Taisacan, and Jose Luis Corona returned to work without penalty.

Joel M. Camacho	Alberto Rodriguez[16]
Asuncion Aguirre	[Juan Carlos Reyes and Bradley Monaco][17]

After Capt. Smith spoke to the employees in the library, he met again with Mr. Hermens for a strategy discussion. The two men believed the protesting employees had walked off the job (and hence "quit") and were attempting to hold the factory "hostage." According to Capt. Smith, Respondent was willing to discuss the shift length concern with the employees, but timing was a major issue: "We wanted to [discuss the matter] after we cut fish, so we did not suffer any more economic loss." Mr. Hermens and Capt. Smith decided not to discuss work issues with the protesting employees before the employees returned to work, as they did not want to encourage the idea that walking off the job was a proper way to resolve employee concerns. They further concluded that employees with more seniority had a greater responsibility for the employees' conduct as they served as mentors for newer employees and were more highly paid. The senior employees would not be permitted to return to work without penalty. The two managers decided they would divide the protesting employees into two groups based on seniority, and they would decline to discuss the extended shift issue but would agree to meet with employees when a lull in production occurred.

After agreeing on a course of action, Mr. Hermens, Capt. Smith and Mr. Octaviano went to the library. Mr. Hermens told the protesting employees they had walked off the job. The employees disagreed, saying Mr. Hermens had directed them to talk to him. Mr. Hermens told employees he had not called any meeting; employees who thought he had were under a misunderstanding. Mr. Hermens said he did not like being held hostage and would discuss the half-hour shift increase with them at a later time. He offered to let the employees return to work without penalty and told them if they did not return to work, Respondent would assume they had quit. Cesar Nieto said the employees were not going to quit, that Mr. Hermens would have to fire them. Mr. Hermens said, "The outcome will be the same; you won't work here."

After about 30-45 minutes, Mr. Hermens divided the group, sending leadmen and employees with greater seniority to the TV room. When selected employees had left for the TV room, Mr. Hermens told the library group they had ten minutes to get back to work. The employees said they wanted to talk about the 16½-hour shifts. Mr. Hermens looked at his watch and told the employees that he did not want to talk about the shift length and that they had only eight minutes left in which to return to work. The employees continued to request a discussion, and Mr. Hermens said, "If you guys don't go back, you are done." Mr. Hermens left, telling the employees that when he returned, he would "finalize this."

When Mr. Hermens left the library, he went to the TV room and told that group he would give them eight minutes to return to work. Even if they chose to return to work, he would reduce their crew share percentage by .5 percent and later deduct 10 percent from their final compensation. Mr. Hermens considered the pay reduction to be a form of disciplinary action.

[16] It is not clear what happened to Alberto Rodriguez. His name does not appear on the list of employees who debarked in Dutch Harbor, Alaska, as detailed later, but there is also no evidence he returned to work.

[17] Juan Carlos Reyes and Bradley Monaco were present in the library but did not sign the paper; their names were later added to the attendance sheet.

After absenting himself from the TV room for eight minutes, Mr. Hermens returned, looked at his watch, and left without speaking.[18] Except for the three employees noted above, none of the employees returned to work. The group in the TV room rejoined the group in the library.

When processing employees quit or are terminated, in Mr. Hermens' words, "they…are no longer my responsibility. The Captain takes care of them knowing what they should and should not do, as a person who is no longer employed on the Phoenix, but [who is still aboard]." Having determined that the protesting employees were no longer employed by Respondent, Mr. Hermens turned the matter over to Capt. Smith. Capt. Smith, knowing he was "incapable of handling such a large group of people that potentially were going to be very unhappy," decided to make an unscheduled port call at Dutch Harbor, Alaska and debark the protesters. Capt. Smith returned to the library and told the workers to get their belongings together because they were "done." Capt. Smith explained certain restrictions as to when and where on the ship the alleged discriminatees could go during the time they remained aboard. The group was comprised of the following employees, hereinafter called "the terminated employees":

Asuncion Aguirre (aka Aguirre Asuncion)
Winston Brown
Jose Cabrera
Joel Camacho
Jorge Camacho
Jose Cervantes
Noel Cornelio
Ricardo Cuevas
Jose Luis Delgadillo
Gabriel Garibay
Baltazar Gonzalez
Alfonso Lopez
Juan Lovos
Miguel Martinez
Brad Monaco
Caesar Nieto
Maurisio Ramirez
Juan Reyes
Ruben Ruiz
Luis Verduzco, Sr.
Luis Verduzco, Jr.
Sergio Velasquez
Arturo Leon [19]

The following morning, February 3, Capt. Smith again spoke to the group of workers, requesting them to sign separation papers saying they had voluntarily quit. When the workers demurred, Capt. Smith told them that if they did not sign, he would drop them off at the nearest port, Dutch Harbor, Alaska, without providing for motel rooms or transportation to Seattle. The employees refused to sign, insisting they had not quit. After a radio consultation with Respondent's human resource department, Capt. Smith relented.

When on the morning of February 3, Mr. Rojas learned employees he supervised had been terminated the previous evening, he asked Mr. Octaviano if he could talk to them to get them to return to work. Mr. Octaviano refused, saying Mr. Hermens had already taken care the matter.

[18] According to Jose Cervantes, when Mr. Hermens returned to the TV room, he said, "You guys still here? You are fired." In absence of corroboration, I discount this testimony.

[19] Sergio Velasquez and Arturo Leon, although terminated, are not named in the complaint as their names were inadvertently not included in the charges filed herein. Arturo Leon has since been reemployed by Respondent. As noted above, the status of Alberto Rodriguez is unclear.

Sometime during the morning of February 3, Arturo Leon told Mr. Hermens he had not understood what had transpired during the meetings of the previous night and asked to return to work. Mr. Hermens said he did not believe him and wished him a "nice life." Respondent gave each terminated employee a Separation Notice, which noted the following:

Reason for Contract Termination	--	Quit
Eligible for Rehire?	--	NO

On the evening of February 3, the terminated employees debarked at Dutch Harbor, Alaska where they were provided with funds and air transportation to Seattle. Respondent had experienced no behavioral problems with the group during the period of walkout through debarkation.

A few days following February 3, Mr. Hermens held a meeting with the remaining factory employees. He told them that some workers had tried to hold the company hostage and to force him to do what they wanted. He said he did not like that. He asked by a show of hands, which employees wanted to work the 16 ½ hour shifts, and all employees raised their hands. On about February 9, Respondent replaced the terminated employees.

D. Termination of Ulysses Nieto

Respondent's handbook prohibits sleeping on the job:

> GENERAL WORK RULES
>
> You are expected to comply with [the General Work Rules], as defined by the following list…Violators are subject to discharge, or lesser disciplinary action, depending upon the gravity of the offense as determined by the Owner, for the following infractions:
> …
> 7. Sleeping while on duty.

During the Phoenix' voyages, it was a common practice for processing workers to sneak into their or other employees' rooms during work time to nap. The workers sometimes exchanged room keys to foil detection, relying on other workers to warn them when supervisors began searching for them. Respondent's normal practice was to warn employees for a first offense.

Following the events of February 2, Mr. Hermens wanted to get rid of the "spies" among the employees, hoping thereby to avoid recurring strikes. Mr. Hermens believed many of the troublemakers came from the Washington town of Wenatchee, and he wanted to get rid of Wenatchee residents as well.

Ulysses Nieto (Mr. Nieto), resident of Wenatchee and brother to Caesar Nieto who was terminated on February 2, remained on the ship after the terminated employees disembarked in Dutch Harbor. In the days after February 2, Mr. Nieto discussed with other employees the increased work demands necessitated by the shortage of workers. Certain employees decided to ask for a raise. On February 15, several spoke to Mr. Rojas and requested a meeting with Mr. Hermens. Later that day, during a cleaning period, employees met with Mr. Hermens and Capt. Smith in the library. Mr. Nieto spoke for the workers, explaining that employees believed the increased work and shorter breaks were unfair and hazardous and complaining that Mr. Rafferty pushed the employees too hard. He asked for raises.

Mr. Hermens told the employees that at end of the trip he would figure out who would get a raise for the next trip and how to reward employees. Mr. Hermens agreed to increase the crew share percentage for two employees, one of whom was Mr. Nieto. The employees expressed dissatisfaction with the plan but returned to work.

Upon returning to his cleaning work, Mr. Nieto felt ill and went to his room to get aspirin without informing his supervisor, Mr. Rojas, who did not notice he had left. While in his room, Mr. Nieto fell asleep on the floor for 20 minutes. During that time, Mr. Estrada notified Mr. Rafferty that Mr. Nieto, whom he had been seeking for 10-15 minutes, was missing from the work area.[20] Mr. Rafferty walked through the factory without finding Mr. Nieto. Suspecting Mr. Nieto was in his room, Mr. Rafferty went there and found him asleep on floor. Although Mr. Hermens was the only manager with authority to discharge processing employees, Mr. Rafferty told Mr. Nieto he was fired because he knew Mr. Hermens would fire him when he learned he had been sleeping on the job. Thereafter, Mr. Hermens approved Mr. Nieto's discharge.

There is no evidence Respondent had ever warned Mr. Nieto about sleeping on the job prior to February 15.[21] Although Mr. Rafferty testified that Mr. Nieto had "an extensive history of missing on shift," that he had orally warned him for sleeping on a pile of sugar, and that Mr. Nieto was "always on the verge of being in trouble," I cannot accept his testimony. Mr. Nieto's last performance evaluation for "A" season of 2002, which was approved by Mr. Rafferty, shows him to have earned nine "excellent" ratings out of ten in such areas as "positive attitude," "follows directions," "returns to work promptly after breaks," and "works rapidly." Written evaluation comments note Mr. Nieto to have been "one of the best, very motivat[ed] and active person…one I depend [on] to show good production because he cares about the job."

E. Termination of Sebastion Cortez

Mr. Cortez did not testify, but Mr. Hermens' testimony along with evidence contained in emails generated by Mr. Hermens provide the facts surrounding Mr. Cortez' discharge. After February 2, Mr. Cortez talked to other employees about his dissatisfaction with the wages paid by Respondent and his belief that he could make more money under less severe working conditions on another catcher/processor boat. When Mr. Hermens learned of Mr. Cortez' interchanges with other employees, he asked Mr. Cortez not to spread his unhappiness. When Mr. Cortez was again observed "being unhappy," Mr. Hermens "completed" Mr. Cortez' contract (i.e., terminated him mid-contract) on February 16. Mr. Hermens explained his motivation in an email to Respondent's human resources office dated March 13:

[20] Mr. Estrada testified he had been looking for Mr. Nieto for nearly an hour. I reject his testimony as it conflicts with both Mr. Rafferty's estimate of a shorter period and Mr. Nieto's testimony.

[21] Following the hearing, Respondent moved to reopen the record for receipt of statements from two of Mr. Nieto's coworkers, which arguably corroborated Mr. Rafferty's testimony that Mr. Nieto had a history of entering others' rooms during work time to sleep. The statements are dated February 20, five days after Mr. Nieto's termination; as they provide no evidence of prior discipline, I declined to reopen the record.

> I completed [Mr. Cortez'] contract because he was quite unhappy here and rather vocal about his unhappiness and how he thought he could [make] much more money with an easier schedule elsewhere. He told me that he did not want to go home that he wanted to stay. It was the wrong time to keep a malcontent on board.

V. Discussion

A. Jurisdiction

Respondent contends that the Board lacks jurisdiction to afford relief to the terminated employees as "seamen" have no right under the Act to engage in the concerted activity of a work stoppage on a vessel in operation on the seas, the governance of which maritime law controls. On August 30, 2004, Respondent filed with the Board a motion to dismiss the complaint, contending that the protesting employees' actions were tantamount to criminal conduct under 18 U.S.C. §2192 and §2193, which prohibit revolt or mutiny. By order dated October 20, 2004, the Board denied Respondent's motion stating that Respondent had "failed to establish that there are no genuine issues of material fact and that it is entitled to summary judgment as a matter of law." At the hearing, Respondent again moved to dismiss the complaint on grounds that the Board lacks jurisdiction over the subject matter herein. The Board has asserted jurisdiction over employers engaged in fish processing at sea. *Employees Negotiating Committee (Western Boat Operators, Inc.),* 177 NLRB 754 (1969); *American Freezerships, Inc.,* 135 NLRB 1113 (1962); *Pacific American Fisheries, Inc.,* 124 NLRB 9 (1959). Further, for the reasons set forth below, I find the Board has jurisdiction to review Respondent's actions herein and to remedy any violations found.

B. Alleged Violations of Section 8(a)(1) of the Act

1. Interrogation

Respondent's processing employees engaged in protected concerted activities within the meaning of Section 7 of the Act when they discussed their objections to Respondent's one-half hour extension of their work shifts, prepared the "Voice of the People," and, on February 2, presented it to factory manager, Mr. Hermens, and sought a meeting with him to discuss their grievances. See *NLRB v. City Disposal Systems, Inc.,* 465 U.S. 822, 831 (1984). Respondent argues that application of *Bourne v. NLRB,* 332 F. 2d 47, 48 (2d Cir. 1964) exculpates Mr. Hermens' questioning of Luis Verduzco, Sr. as to who had prepared the protest letter. However, Mr. Hermens' interrogation does not meet the *Bourne* requirements that the employer have a valid purpose in seeking the information, which purpose the employer communicates to the employee. Here, Mr. Hermens' purpose, as explicated by the testimony of Mr. Rafferty, was to ascertain the ringleaders behind the letter in order to hold them accountable, and that unlawful purpose was clearly understood by Luis Verduzco, Sr. who testified that he knew Mr. Hermens was "looking for someone to be guilty…" In these circumstances, Mr. Hermens engaged in unlawful interrogation of Luis Verduzco, Sr. in violation of Section 8(a)(1) of the Act. See *Guess? Inc.,* 339 NLRB 432 (2003).

2. February 2 Termination of Fish Processors

The General Counsel alleges in the complaint that Respondent terminated 21 of the protesting employees for engaging in protected concerted activities and by so doing violated Section 8(a)(1) of the Act. Although Respondent has consistently characterized the terminations as voluntary quits, by telling the terminated employees on February 2 that they

were "done," by informing them that Respondent considered them to have quit, and by noting their ineligibility for rehire, Respondent clearly discharged them. *Matador Lines, Inc.,* 323 NLRB 189, fn 2 (1997); *Indian Hills Care Center*, 321 NLRB 144, 154 (1996) (assertion that an employee's conduct constitutes a resignation or quit suggests the employer regarded conduct and continued employment to be incompatible).

The General Counsel failed to include in the complaint the names of Sergio Velasquez and Arturo Leon who participated in the same concerted protected activity and received the same consequences as the 21 alleged discriminatees. The General Counsel did not name the two employees because they had inadvertently been omitted from the group listed in the unfair labor practice charges herein, and the General Counsel did not become aware of the omission until after the 10(b) period had elapsed.[22]

Notwithstanding the General Counsel's failure to seek amendment of the complaint to include the names of Sergio Velasquez and Arturo Leon, I find it appropriate to consider the legality of Respondent's conduct toward all protesting employees who were terminated on February 2. "It is well settled that the Board may find and remedy a violation even in the absence of a specified allegation in the complaint if the issue is closely connected to the subject matter of the complaint and has been fully litigated.[citations omitted]." *Atlantic Veal & Lamb, Inc.,* 342 NLRB No. 37, fn. 5 (2004). The issues regarding the terminated employees were fully litigated, and Respondent's motivation was the same as to all of them. My otherwise untimely inclusion of Sergio Velasquez and Arturo Leon as discriminatees is appropriate as their terminations are inextricably connected to the timely alleged terminations of the alleged discriminatees, involve the identical underlying legal theory and factual situation, and are subject to the same employer-raised defenses. *Redd-I, Inc.,* 290 NLRB 1115, 1118 (1988); *Precision Concrete,* 337 NLRB 211 (2001). See also *Peng Teng,* 278 NLRB 350, fn. 2 (1986) (Board left to compliance stage determination of identities of two individuals inadvertently omitted from the complaint). Accordingly, I have considered whether Sergio Velasquez and Arturo Leon along with the 21 alleged discriminatees were unlawfully terminated as alleged in the complaint.

Prior to their work stoppage of February 2, Respondent's employees discussed shift length dissatisfaction, drafted a protest petition and a protest letter, and sought a meeting with management. All of those actions were protected and concerted.[23] Any discipline, including termination, of employees for engaging in such protected concerted activities violates Section 8(a)(1) of the Act. *Accel, Inc.,* 339 NLRB 1052 (2003). However, Respondent did not discipline any employee because they engaged in any of the enumerated, protected activities. While it is true Mr. Rafferty explicitly and Mr. Aldana implicitly told the protesting workers they were fired, their statements do not establish discharge. Neither Mr. Rafferty nor Mr. Aldana had authority to terminate any employee, and Mr. Hermens and Capt. Smith's later statements to the protesting employees make it clear that Respondent had no intention, at least initially, of firing

[22] As noted earlier at footnote 17, it is possible that Alberto Rodriguez was also one of the terminated employees. Accordingly, my conclusions as to Sergio Velasquez and Arturo Leon apply also to Alberto Rodriguez if, at the compliance stage, it is determined he was one of the terminated employees.

[23] Although Respondent argues that the "reasonableness of the charging parties' complaints about their working hours" is at issue, as long as employee complaints are not made in bad faith, of which there is no evidence here, their reasonableness is not relevant to a determination of whether the employees' conduct is protected under the Act. *Palco,* 325 NLRB 305, 307 (1998); *St. Barnabas Hospital,* 334 NLRB 1000 (2001).

the protesting employees. Although Mr. Hermens was clearly angered by the employees' conduct in pressing for a discussion about their extended shift hours, Respondent repeatedly urged the protesting employees to return to work without incurring any penalty. There is no evidence to suggest that the employees' tenure of employment would have been affected in any way had they returned to work when directed to do so. Accordingly, I find Respondent did not terminate, or otherwise discipline, any of the processing employees on February 2 for discussing with one another their 16 ½-hour shifts, drafting the petition and the protest letter, seeking a meeting with management, or any other protected, concerted activity they may have engaged in prior to refusing to return to work.

When the protesting employees refused to return to work as directed by Respondent until they had aired their grievance over increased shift hours, they engaged in a work stoppage or a strike. Had the work stoppage herein occurred among factory employees in a shoreside setting, there is no question it would have been protected under the Act. In *Benesight, Inc.,* 337 NLRB 282 (2001), unrepresented customer service employees protested newly imposed work procedures by ceasing to take customer calls "until they could get a resolution of their problem from management." Supra at 286. The Board held that when an in-plant work stoppage is peaceful, is focused on a specific job-related complaint, and causes little disruption of production by those employees who continue to work, employees are "entitled to persist in their in-plant protest for a reasonable period of time [citation omitted]." Supra at 282. See also *Accel, Inc.,* supra (employees who walked off their assembly line to protest the employer's denial of a scheduled work break engaged in protected activity). Here the protesting employees sought a discussion with management of a term and condition of their employment, engaged in no insubordinate or disruptive behavior, did not attempt to set their own conditions of employment, and in no way interfered with Respondent's operations or production, except insofar as their absence from processing lines made labor adjustments necessary. Consequently, the employees' work stoppage fits within the rights enumerated in Section 7 of the Act and constitutes concerted, protected activity. *NLRB v. Washington Aluminum Company,* 370 U.S. 9 (1962).

There is no dispute as to the actions Respondent took in response to its employees' concerted work stoppage:

1. After initial discussion with the protesting employees on February 2 and following their refusal to return to work, Respondent divided them into two groups comprised, respectively, of more and less senior employees. Respondent once more gave each group at short time to exercise the option of returning to work, but this time Respondent informed the more senior employees that a penalty in the form of reduced compensation would be imposed. The proposed penalty constituted discipline for senior employees' participation in and encouragement of newer employees to participate in the protest. [24]
2. When the protesting employees declined Capt. Smith and Mr. Hermens' call to return to work, Respondent terminated them rather than simply removing them from the work situs, which Respondent was entitled to do when the employees refused to work and which Respondent did on the following day.

[24] The General Counsel did not allege Respondent's threat to impose discipline on senior protesters or its February 3 threat to leave the strikers stranded if they did not sign separation papers stating they had voluntarily quit, as violations of the Act. Therefore, I make no findings with regard to that conduct.

Respondent agrees "the charging parties here had every right to…petition for their mutual aid or protection, and to express their dissatisfaction with the terms and conditions of their employment, so long as they did not violate the NLRA." It follows that if the employees' work stoppage were protected by the Act, then Respondent's termination of employees violated Section 8(a)(1) of the Act. Respondent's position, however, is that the Act does not protect the work stoppage because it occurred on an ocean-going vessel at sea where the charging parties could not "usurp the Master's authority at sea, even if the Master's action would constitute an unfair labor practice on land." Respondent argues that the work stoppage and Respondent's responses to it are covered by federal maritime law and not by the Act. [25]

The Board has acknowledged that employment in the maritime industry "is uniquely subject to pervasive regulation by Federal maritime statutes, and that the Act often must be accommodated to those statutes. [Citations omitted]." *Exxon Shipping Co.,* 312 NLRB 566, 567 (1993). One such statute decrees that a seaman's willful disobedience to a lawful command at sea constitutes criminal conduct; 46 U.S.C. § 11501 (4) reads in pertinent part as follows:

> When a seaman lawfully engaged commits any of the following offenses, the seaman shall be punished as specified:
> ….
> (4) For willful disobedience to a lawful command at sea, the seaman, at the discretion of the master, may be confined until the disobedience ends, and on arrival in port forfeits from the seaman's wages not more than 4 days' pay or, at the discretion of the court, may be imprisoned not more than one month.

In *Southern Steamship Company v. NLRB,* 316 U.S. 31 (1942), the United States Supreme Court held that seamen aboard a ship anchored in the Houston, Texas, harbor who were discharged for engaging in a strike while on board the vessel had engaged in conduct violative of maritime mutiny statutes and therefore were engaged in criminal conduct unprotected by the National Labor Relations Act. See also *U.S. Bulk Carriers v. Arguelles,* 400 U.S. 351 (1971) (employer not entitled to compel arbitration of seaman's wage claim pursuant to collective-bargaining agreement in light of provisions of Federal maritime law granting seamen right to bring such actions in court) and *Mt. Vernon Tanker Co. v. NLRB,* 549 F. 2d 571 (9th Cir. 1977) (seaman's rights under *Weingarten*[26] do not exist during ship's voyage). Respondent argues that the Board "lacks authority to apply the protections of the NLRA in such a way as to unlawfully interfere with the operations of a vessel at sea [or to contravene] the master's exclusive right…to command the vessel and govern the actions of the seamen." Respondent is accurate in its statement of the law, but it is not clear that the processing employees herein are "seamen," or that their duties are analogous to those of the seamen in *Southern Steamship Company* or other cases cited above*,* so as to deny to them the coverage of the Act and to require application of maritime law to their concerted activity.

The Supreme Court has defined "seamen" in Jones Act[27] cases, stating "It is not necessary that a seaman aid in navigation or contribute to the transportation of the vessel... a seaman must be doing the ship's work…the requirement that an employee's duties must 'contribut[e] to the function of the vessel or to the accomplishment of its mission' captures well

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[25] As Respondent's motivation is undisputed, it is unnecessary herein to apply the Board's analytical guidelines in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F. 2d 899 (1st Cir. 1981), cert. Denied 455 U.S. 989 (1982). *La-Z-Boy Midwest,* 340 NLRB No. 10 (2003).

[26] *NLRB v. J. Weingarten,* 420 U.S. 251 (1975).

[27] 46 App. U.S.C.A. § 688.

an important requirement of seaman status." *McDermott Intern., Inc. v. Wilander,* 498 U.S. 337, 355 (1991). In *Chandris, Inc. v. Latsis,* 515 U.S. 347, 376 (1995), the Court held that the "'employment-related connection to a vessel in navigation'" necessary to qualify as a seaman under the Jones Act, comprises two basic elements: The worker's duties must contribute to the function of the vessel or to the accomplishment of its mission, and the worker must have a connection to a vessel in navigation…that is substantial in terms of both its duration and its nature [citation omitted]".

An argument could be made that any work performed aboard a vessel contributes to the function or the mission of the vessel and that any worker aboard a vessel who is connected, e.g. employed by, the vessel has a work connection to the vessel. If those premises were accepted, all individuals employed by a vessel aboard the vessel would be "seamen," and any work stoppage aboard a vessel, whether in harbor or on the open sea, would contravene the vessel's mission. Further, under that view, any work stoppage uncountenanced or forbidden by the ship's captain or master would be mutinous and unprotected by the Act. Following this line of reasoning to its logical conclusion, employers whose production can be performed shoreside may cut off their employees from vital Section 7 protections by locating their operations aboard a vessel in navigation. However, neither the Supreme Court nor any other forum has ever expressed such a view,[28] and there are significant factual distinctions between *Southern Steamship Company*, supra, and the instant case to militate against such a conclusion.

In *Southern Steamship Company*, the employees whose work stoppage was at issue had work duties directly related to the operation of the vessel. In *Mt. Vernon Tanker Co.*, the employee who pressed his *Weingarten* rights was employed as chief pumpman of the vessel, also a job directly related to the operation of the vessel. As found by the Court in *Southern Steamship Company*, the crew refused the captain's order to return to work, refused to leave the ship to make way for a replacement crew, and one striking crew member threatened an engineer that he would be sorry if he tried to turn on the deck steam himself. While the strikers "did not engage in violence or prevent the other men and officers from proceeding with preparations for the voyage…they did what they could to prevent the ship from sailing." *Southern Steamship Company,* at 40-41. As a practical matter, the Court found, the strikers wrested control of the vessel from its officers. *Southern Steamship Company,* at 47.

The employee/employer relationships focused on in *Southern Steamship Company* and *Mt. Vernon Tanker Co.* differ significantly from those in this case. The protesting workers herein labored only in the ship's fish-processing factory and had no responsibility for the operation or movement of the ship. Although Capt. Smith had ultimate responsibility for the entire vessel, an entirely different supervisory chain oversaw the factory employees' work than that which oversaw the work of the seamen operating the vessel.[29] The employees' February 2 work cessation was neither intended to nor did it prevent the ship from functioning as an ocean-going vessel, and Capt. Smith became involved in the work stoppage at the request of factory manager, Mr. Hermens. Capt. Smith was not present in post-February 2 meetings between the factory workers and Mr. Hermens, and there is no evidence he had any input into resolution of

[28] The Court in Southern Steamship stated, "It should be stressed that the view we have taken here does not prevent the redress of grievances under the Act." 316 U.S. at 48.

[29] Indeed, Capt. Smith was so removed from factory oversight that, like the processing employees, he did not learn of their shift length increase until after the Phoenix left Seattle.

their complaints. Thus, unlike the situations in *Southern Steamship Company* and *Mt. Vernon Tanker Co.*, there is a marked separation between the protesting factory workers' duties and oversight and the operation of the vessel.

Considering all the circumstances herein, I find the terminated employees are not "seamen," and, therefore, Federal maritime statutes do not preempt their protections under the Act. Consequently, the terminated employees' refusal to obey their supervisors' directions to return to work did not constitute mutinous behavior. Further, it is immaterial that Respondent may have had a good-faith belief that the employees' conduct was mutinous. An employer violates Section 8(a)(1) of the act by discharging or disciplining employees based on its good-faith but mistaken belief that the employee engaged in misconduct in the course of protected activity. *NLRB v. Burnup & Sims,* 379 U.S. 21 (1964).

Respondent also argues that the protesting employees' conduct was unprotected by the Act without regard to maritime law. Respondent analogizes the instant conduct to that of employees disseminating deliberately false statements[30] or urging participation in an unlawful secondary boycott.[31] But the analogies are inapposite; the employees here engaged in no misconduct, unless their concerted protest, in itself, can be so characterized. Respondent argues that it can. In Respondent's view, the protesting employees engaged in unreasonable and unprotected behavior by conducting a work stoppage aboard a vessel in the open sea when a rational alternative had been offered. Respondent posits that when Mr. Hermens and Capt. Smith directed employees to return to work, assuring them their concerns would be addressed at the first opportunity, the continued work stoppage lost any protection it might have had. The cases cited by Respondent to support this proposition are inapplicable. *G.W. Gladders Towing Co,* 287 NLRB 186 (1987) and *SCNO Barge Lines, Inc.,* 287 NLRB 169 (1987) both involve questions of reasonable alternatives to nonemployee labor organizers' access to crewmen, which is not at issue herein, while *Felix Industries, Inc.,* 331 NLRB 144 (2000) considers whether an employee lost the Act's protection by obscene response to a supervisor, also not an issue herein. As to Respondent's contention that the workers' behavior, including their refusal to accept Respondent's offer to discuss their concerns at a more convenient time was "unreasonable," the Board has rejected the claim that "an employee protest must also employ reasonable means in order to be protected by the Act. *Riverbay Corporation, D/B/A Co-Op City,* 341 NLRB No. 34, fn 5 (2004), citing *Accel, Inc.,* supra, and *Trompler, Inc.,* 335 NLRB 478, 480, fn 26 (2001) ("the reasonableness of workers' decisions to engage in concerted activity is irrelevant to the determination of whether a labor dispute exists or not"), enfd. 338 F.3d 747 (7th Cir. 2003).

Respondent also contends that the work stoppage, which might "be considered protected activity in a typical land-based workplace" is unprotected because it occurred in the middle of an ocean where "it is simply not possible to readily locate replacement workers" and "interfere[d] with Respondent's legitimate business operations." Respondent's assertion that the work stoppage impacted its business is undeniable, requiring, as it did, Respondent to make unscheduled land stops to debark the strikers and later to procure replacements. Those singular circumstances are, however, irrelevant to the strike's lawfulness. The whole point of a strike is to exert economic pressure on an employer by withholding needed labor services and thereby discommoding the employer. While a strike's potential for harmful impact on an

[30] *Sprint/United Management Co.*, 339 NLRB 127 (2003).
[31] *Electronic Data Systems Corp.,* 331 NLRB 343 (2000).

employer's business may justify certain employer actions,[32] the fact that this strike occurred in circumstances that intensified the economic impact on Respondent neither renders it unlawful nor justifies Respondent's termination of strikers. There is no evidence the protesting employees here had any object other than peacefully to pressure Respondent to discuss the shift increases with them. Their work stoppage was neither destructive nor obstructive, although it may have engendered frustration and inconvenience for Respondent, and it constituted a lawful expression of employee concerns. *Rhee Brothers, Inc.*, 343 NLRB No. 80 (2004).

Under the Act, strikers retain the status of employees. While employees can be permanently replaced for engaging in an economic strike, they may not lawfully be discharged for doing so. *NLRB v. International Van Lines,* 409 U.S. 48 (1972); *Rhee Brothers, Inc.*, supra. Accordingly, I find Respondent violated Section 8(a)(1) of the Act by terminating the protesting employees for engaging in concerted protected activity.

3. Termination of Ulysses Nieto

Mr. Nieto was engaged in protected concerted activity when, on February 15, he served as spokesman for factory workers who sought increased compensation for taking on increased work loads following the February 2 terminations. *Children's Studio School Public Charter School,* 343 NLRB No. 19 (2004). Respondent's motivation in terminating Mr. Nieto on the same day is in dispute. In resolving that issue, the Board's analytical guidelines in *Wright Line,* supra, control. If the General Counsel's evidence supports a reasonable inference that protected concerted activity was a catalyzing factor in Respondent's discharge of Mr. Nieto, he has made a prima facie showing of unlawful conduct.[33] The burden of proof then shifts to Respondent to establish persuasively by a preponderance of the evidence that it would have made the same decision, even in the absence of protected activity.[34] *Avondale Industries, Inc.,* 329 NLRB 1064 (1999); *T&J Trucking Co.,* 316 NLRB 771 (1995). Mr. Hermens, who approved Mr. Nieto's discharge, bore patent animosity toward employees' protected activities. He wanted to rid Respondent of "spies" and troublemakers, and Mr. Nieto fit the troublemaker criteria: he was a resident of Wenatchee, from which area most of the strikers haled; he was the brother of striker Caesar Nieto, and he engaged in the protected activity of speaking for workers seeking raises after the February 2 terminations, all of which Mr. Hermens knew. Finally, Mr. Nieto was terminated, assertedly for sleeping on the job, shortly after presenting employee demands on February 15. In these circumstances, I conclude the General Counsel has made "an initial 'showing sufficient to support the inference that protected conduct was a motivating factor'" in

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[32] See e.g., *NLRB v. Brown Food Store,* 380 U.S. 278 (1965) (inventory stockpiling, work transferal, etc.) and *Harter Equip.,* 280 NLRB 597 (1986), enf. sub. nom. Local 825 IUOE v. NLRB, 829 F3d 458 (3d Cir. 1987) (employer lockout).

[33] "The General Counsel must establish four elements by a preponderance of the evidence. First, the General Counsel must show the existence of activity protected by the Act. Second, the General Counsel must prove that the respondent was aware that the employee had engaged in such activity. Third, the General Counsel must show that the alleged discriminatee suffered an adverse employment action. Fourth, the General Counsel must establish a motivational link, or nexus, between the employee's protected activity and the adverse employment action. [citation omitted]." *American Gardens Management Company,* 338 NLRB 644, 645 (2002).

[34] A "preponderance" of evidence means that the proffered evidence must be sufficient to permit the conclusion that the proposed finding is more probable than not. McCormick Evidence, at 676-677 (1st ed. 1954).

Respondent's decision to terminate Mr. Nieto. *American Gardens Management Company,* supra. The burden of proof therefore shifts to Respondent to show that Mr. Nieto's termination would have (not just could have) occurred even in the absence of his leadership role among employees seeking post-February 2 recompense. *Avondale Industries, Inc.,* supra at 1066.

In assessing Respondent's evidence of lawful purpose in terminating Mr. Nieto, I recognize the fact that an employer's desire to retaliate against an employee or to curtail protest does not, of itself, establish the illegality of a termination. If an employee provides an employer with sufficient cause for dismissal by engaging in conduct that would, in any event, have resulted in termination, the fact the employer welcomes the opportunity does not render the discharge unlawful. *Avondale Industries, Inc.*, supra; *Klate Holt Company,* 161 NLRB 1606, 1612 (1966). Further, it is well established the Board "cannot substitute its judgment for that of the employer and decide what constitutes appropriate discipline." *Detroit Paneling Systems, Inc.,* 330 NLRB 1170, 1171 fn. 6 (2000) and cases cited therein. Nonetheless, the Board's role is to ascertain whether an employer's proffered reasons for disciplinary action are the actual ones. *Ibid.* The question here is whether Respondent terminated Mr. Nieto because he slept when he should have been working or because he was a high-profile protester.

Direct evidence of unlawful motivation is seldom available, and unlawful motivation may be established by circumstantial evidence, the inferences drawn therefrom, and the record as a whole. *Tubular Corporation of America,* 337 NLRB 99 (2001); *Abbey Transportation Service*, 284 NLRB 689, 701 (1987); *Shattuck Denn Mining Corp., 362* F.2d 466, 470 (9th Cir. 1966). Indications of discriminatory motive may include expressed hostility toward the protected activity,[35] abruptness of the adverse action,[36] timing,[37] disparate treatment,[38] and/or departure from past practice.[39] Here, there is no overt evidence of union animus directed specifically toward Mr. Nieto, but circumstances exist from which it is reasonable to infer animus. Mr. Hermens hoped to avoid recurring strikes by ridding the factory of "spies" and troublemakers, which strategy Mr. Rafferty was well aware of. Since Mr. Nieto had just led an employee push for increased wages, it is reasonable to infer that Respondent considered him an activist, or, in Mr. Hermens' view, a troublemaker. Respondent's work rules forbade sleeping while on duty, but Mr. Nieto's filching a few minutes of illicit sleep was not an uncommon infraction of Respondent's work rules, and the rules provide for discharge or "lesser disciplinary action" depending on the "gravity of the offense." In fact, Respondent normally warns employees for a first offense of sleeping on the job. Nevertheless, when Mr. Rafferty saw Mr. Nieto sleeping, he abruptly fired him, contrary to Respondent's normal practices. Respondent has neither satisfactorily explained why Mr. Rafferty, rather than Mr. Hermens, fired Mr. Nieto nor clarified why Mr. Nieto's sleeping on the job was so much graver than other employees' similar conduct so as to require termination rather than warning.[40] Both departures from past practice suggest unlawful considerations motivated the discharge. Moreover, in spite of Mr. Nieto's prior excellent performance evaluation, Respondent attempted to portray him as a marginal employee who was "always on the verge of being in trouble." Respondent's attempt to

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[35] *Mercedes Benz of Orland Park.,* 333 NLRB 1017 (2001).

[36] *Dynabil Industries, Inc.*, 330 NLRB 360 (1999).

[37] *McClendon Electrical Services, Inc.,* 340 NLRB No. 73, FN 6 (2003); *Bethlehem Temple Learning Center, Inc.,* 330 NLRB 1177 (2000).

[38] *In re NACCO*, 331 NLRB 1245 (2000).

[39] *Sunbelt Enterprises,* 285 NLRB 1153 (1987).

[40] While Respondent contends Mr. Nieto's lack of remorse and history of similar conduct justify termination, as noted earlier I have not credited the proffered supporting evidence.

distort or misrepresent Mr. Nieto's employment history further suggests improper motivation in terminating him. Accordingly, I find Respondent violated Section 8(a)(1) of the Act by terminating Mr. Nieto for engaging in concerted protected activity.

4. Termination of Sebastion Cortez

Respondent terminated Mr. Cortez on February 16 because he complained to other employees about wages and the processors' arduous schedule. Respondent argues that Mr. Cortez was not engaged in protected activity because he was "simply complaining and spreading misinformation to his fellow workers." While griping about a purely personal concern is not ordinarily considered action undertaken for mutual aid or protection, voicing concerns that pertain to working conditions affecting other employees as well as the complaining worker is protected by Section 7 of the Act. *Alaska Ship and Drydock, Inc.,* 340 NLRB No. 95, fn 1 (2003) (maintenance of a policy banning wage discussion without sufficient business justification violates the Act). Moreover, the Board considers that "the truth or falsity of an employee's communications to others generally is immaterial to the protected nature of the activity [citations omitted]." *Mobil Oil Exploration & Producing, U.S., Inc.,* 325 NLRB 176, fn 9 (1997).

Terminating an employee for complaining about working conditions violates 8(a)(1). *Aroostook County Regional Ophthalmology Center,* 317 NLRB 218 (1995). Accordingly, I find Respondent's termination of Sebastion Cortez violated Section 8(a)(1) of the Act.

Conclusions of Law

1. Respondent is engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. Respondent violated Section 8(a)(1) of the Act on February 2 by interrogating Luis Verduzco, Sr.
4. Respondent violated Section (1) of the Act on February 2 by discharging the following employees because they engaged in protected concerted activities:

Asuncion Aguirre (aka Aguirre Asuncion)	Juan Lovos
Winston Brown	Miguel Martinez
Jose Cabrera	Brad Monaco
Joel Camacho	Caesar Nieto
Jorge Camacho	Maurisio Ramirez
Jose Cervantes	Juan Reyes
Noel Cornelio	Ruben Ruiz
Ricardo Cuevas	Luis Verduzco, Sr.
Jose Luis Delgadillo	Luis Verduzco, Jr.
Gabriel Garibay	Sergio Velasquez
Baltazar Gonzalez	Arturo Leon [41]
Alfonso Lopez	

5. Respondent violated Section 8(a)(1) of the Act on February 15 by discharging Ulysses Nieto because he engaged in protected concerted activities.

[41] The question of whether Alberto Rodriguez should be included in this group of discharged employees is left to the compliance stage.

6. Respondent violated Section 8(a)(1) of the Act on February 16 by discharging Sebastion Cortez because he engaged in protected concerted activities.
7. The unfair labor practices set forth above affect commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

Remedy

Having found that Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Respondent having unlawfully discharged the above-named employees, it must offer them reinstatement insofar as it has not already done so and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). [42]

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[43]

ORDER

Respondent, Phoenix Processor Limited Partnership, its officers, agents, successors, and assigns, shall

1. Cease and desist from
   a. Interrogating Luis Verduzco, Sr.
   b. Discharging employees because they engage in protected concerted activities.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

   a. Within 14 days from the date of this Order, insofar as it has not already done so, offer the following employees (the discharged employees) full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed. [44]

Asuncion Aguirre (aka Aguirre Asuncion)	Juan Lovos
Winston Brown	Miguel Martinez
Jose Cabrera	Brad Monaco

[42] Ulysses Nieto was incarcerated at the time of the hearing. The question of what remedy he is entitled to is left to the compliance stage.

[43] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[44] The question of whether Alberto Rodriguez is entitled to any remedy herein is left to the compliance stage.

Joel Camacho	Caesar Nieto
Jorge Camacho	Maurisio Ramirez
Jose Cervantes	Juan Reyes
Noel Cornelio	Ruben Ruiz
Ricardo Cuevas	Luis Verduzco, Sr.
Jose Luis Delgadillo	Luis Verduzco, Jr.
Gabriel Garibay	Sergio Velasquez
Baltazar Gonzalez	Arturo Leon
Alfonso Lopez	Ulysses Nieto
	Sebastion Cortez

b. Make the discharged employees whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of the decision.

c. Expunge from its files any reference to the unlawful discharges of each of the discharged employees and thereafter notify them in writing that this has been done and that the discharges will not be used against them in any way.

d. Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

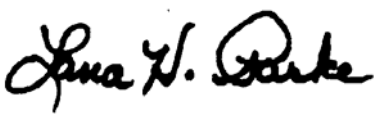
e. Within 14 days after service by the Region, post at its office in Seattle, Washington, copies of the attached notice[45] marked "Appendix."[46] Copies of the notice, on forms provided by the Regional Director for Region 19 after being signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, Respondent has gone out of business or closed the facility involved in these proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Respondent at any time since February 2, 2003.

[45] If, at the compliance stage, it is determined that Alberto Rodriguez was one of the group of employees unlawfully terminated on February 2, 2003, his name is to be added to the list of employees on the Appendix.

[46] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

f. Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply.

Dated, at San Francisco, CA: February 4, 2005



Lana H. Parke
Administrative Law Judge

JD(SF)-10-05
Seattle, Washington

APPENDIX
NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT do anything that interferes with these rights. More particularly,
WE WILL NOT discharge any of you for protesting working conditions or for engaging in a protected work stoppage.
WE WILL NOT interrogate you about protesting working conditions.
WE WILL NOT In any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, within 14 days from the date of the Board's Order, insofar as we have not already done so, offer the following employees full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed:

Asuncion Aguirre
(aka Aguirre Asuncion)
Winston Brown
Jose Cabrera
Joel Camacho
Jorge Camacho
Jose Cervantes
Noel Cornelio
Ricardo Cuevas
Jose Luis Delgadillo
Gabriel Garibay
Baltazar Gonzalez
Arturo Leon
Alfonso Lopez
Juan Lovos
Miguel Martinez
Brad Monaco
Caesar Nieto
Ulysses Nieto
Maurisio Ramirez
Juan Reyes
Ruben Ruiz
Luis Verduzco, Sr.
Luis Verduzco, Jr.
Sergio Velasquez
Sebastion Cortez

WE WILL make the above-named employees whole for any loss of earnings and other benefits resulting from their discharges, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges of the above employees, and **WE WILL**, within 3 days thereafter, notify them in writing that this has been done and that the discharges will not be used against them in any way.

Phoenix Processor Limited Partnership

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

915 2nd Avenue, Federal Building, Room 2948, Seattle, WA 98174-1078

(206) 220-6300, Hours: 8:15 a.m. to 4:45 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (206) 220-6284.